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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE ALFREDO GONZALES, Defendant and Appellant.	F056127 (Super. Ct. No. BF115341-A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Paul V. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lloyd G. Carter and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a jury trial, Jose Alfredo Gonzales (appellant) was convicted of rape (Pen. Code, § 261, subd. (a)(2)),[1] penetration with a foreign object (§ 289, subd. (a)), torture (§ 206), and attempted murder (§§ 664, 187, subd. (a)). The jury found true the allegations that, in the commission of the rape and penetration with a foreign object, appellant inflicted great bodily injury (§§ 667.61, subd. (e)(3), 12022.8) and torture (§ 667.61, subd. (d)(3)) on the victim, making appellant subject to the "One Strike" law (§ 667.61, subd. (a)). It found not true the allegations that those crimes were committed during the commission of a residential burglary. The jury acquitted appellant of a second count of penetration with a foreign object (§ 289, subd. (a)) and sodomy (§ 286, subd. (c)(2)), and found him guilty of the lesser included misdemeanor offenses of battery and assault (§§ 243, subd. (a), 240) on both counts.

The trial court sentenced appellant to a determinate term of nine years for the attempted murder conviction, plus 25 years to life with a five-year great bodily injury enhancement on the rape conviction. The court stayed sentence under section 654 for the convictions of penetration with a foreign object and torture.

On appeal, appellant claims the trial court erroneously denied his *Batson/Wheeler*[2] motion challenging the prosecutor's use of peremptory challenges and that his torture conviction is not supported by substantial evidence. We disagree and affirm.

FACTS

Appellant and K.I. were in a relationship for over two years before it ended. But appellant continued to call her and would show up uninvited at her home and office. One night, K.I. was asleep when she awoke to find appellant naked in her bed with her. K.I. had sex with appellant because she was afraid to refuse him.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled in part by *Johnson v. California* (2005) 545 U.S. 162, 173 (*Johnson*).

A week later, on July 7, 2006, K.I. was at home ready to go to sleep when a man named Eddie called her. She had gone out with him several times recently and his phone number was entered into her cell phone. Eddie wanted to go out, but K.I. declined and went back to bed. She awoke to again find appellant naked on her bed. K.I. asked him to get dressed and leave.

Appellant asked K.I. who Eddie was and punched her in the face. He then pushed her back onto the bed, punched her repeatedly, threatened her, choked her, and kicked her to the point she thought she was going to die. Appellant raped and sexually assaulted K.I. She eventually blacked out and, when she came to, she escaped and ran to the neighbors next door. K.I. was taken to the emergency room, where she was treated for multiple abrasions, a fractured rib, a collapsed lung, compressed spinal column, concussion syndrome, a facial fracture, and subconjunctival hematoma.

Appellant's defense was that K.I.'s injuries were not as serious as she claimed and that she was the one who invited him to her apartment on the night of the assault. According to appellant, the two went to bed, but he was not in the mood to have sex. The two fell asleep, and when she awoke, K.I. asked him what he was doing in the bed and ordered him to leave. K.I. took a swing at appellant before he hit her with his fists.

Appellant acknowledged that he hit K.I. "[v]ery hard," for "[t]wo to three minutes," that he grabbed her by the throat, grabbed her by the hair, and yelled at her, but he denied that he threatened to kill her. He was then sorry for what he had done and looked for K.I.'s gun so that he could kill himself.

DISCUSSION

1. Peremptory Challenges

Appellant challenges the trial court's denial of his *Batson/Wheeler* motion with regard to a Hispanic prospective juror. Hispanics are a cognizable group for purposes of *Batson/Wheeler* analysis. (*People v. Trevino* (1985) 39 Cal.3d 667, 686, disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221.)

"The purpose of peremptory challenges is to allow a party to exclude prospective jurors who the party believes may be consciously or unconsciously biased against him or her. [Citation.]" (*People v. Jackson* (1992) 10 Cal.App.4th 13, 17.) Peremptory challenges may properly be used to remove jurors believed to entertain specific bias, i.e., bias regarding the particular case on trial or the parties or witnesses thereto. (*Wheeler, supra*, 22 Cal.3d at p. 274.) However, "'[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds"—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. [Citations.]' [Citation.]" (*People v. Bell* (2007) 40 Cal.4th 582, 596; see also *Batson, supra*, 476 U.S. at pp. 88-89; *Wheeler, supra*, at pp. 276-277.)

> "The United States Supreme Court has recently reaffirmed that *Batson* states the procedure and standard to be used by trial courts when motions challenging peremptory strikes are made. 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide … whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 541, quoting *Johnson, supra*, 545 U.S. at p. 168, fn. omitted.)

The California Supreme Court has "endorsed the same three-part structure of proof for state constitutional claims. [Citations.]" (*People v. Bell, supra,* 40 Cal.4th at p. 596; see *Wheeler, supra*, 22 Cal.3d at pp. 280-282.)

With these principles in mind, we turn to the facts of the case before us.

During voir dire, defense counsel made a motion on *Batson/Wheeler* grounds, alleging that the prosecutor was "systematically excluding Hispanics." As argued by

defense counsel, the prosecutor had exercised 10 peremptory challenges, three involving individuals with Hispanic surnames: juror Nos. 1390718, 1349172, and 1207916. According to defense counsel, the three "appear to be of Hispanic heritage," although he thought there "might be some question" with regard to juror No. 1390718. Defense counsel acknowledged that he, too, had excused a prospective Hispanic juror, "based on good cause," and there was one Hispanic juror currently seated in the box, but he argued that the challenges by the prosecutor suggested "some prima facie showing of statistical exclusion of Hispanics, and especially Hispanic males."

The trial court stated it would not "in the interest of time" make a determination of a prima facie showing but, instead, solicited a response from the prosecutor. The prosecutor explained:

> "I excused Ms. (1390718) because her brother was accused of molest, and she did not feel that the investigation was handled properly. I believe she is the juror that talked about the brother—or excuse me—not caring for the investigation, the brother's lawyer did, if I recall from yesterday. That is why I excused her. [¶] With Mr. (1349172), he had the DUI [driving under the influence] conviction. He has a couple of nieces that may have been molested by a relative that's still an ongoing investigation, and I didn't feel this was an appropriate case for him. [¶] And as regard to Mr. (1207916), he was involved in a street fight where he was stabbed. And this is a case involving a lot of violence, and I did not feel that it would be appropriate for him to hear the evidence in this case based on what he went through recently."

The trial court then denied the motion, stating "both sides are entitled to a determination whether or not there is a prima facie case. I'll make that determination. If I get by a prima facie case, I find there is sufficient basis upon which to exercise peremptories as to those jurors."

Appellant's argument focuses on the prosecutor's exercise of a peremptory challenge to excuse juror No. 1390718. He contends the reasons given by the prosecutor do not withstand scrutiny under *Batson/Wheeler*. We disagree.

The trial court, in essence, ruled for the defense in step one of the *Batson/Wheeler* analysis by asking the prosecutor to come forward with a race-neutral explanation as to

each challenge, which is step two of the *Batson/Wheeler* analysis. (See *People v. Silva* (2001) 25 Cal.4th 345, 384.)

> "In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.… [¶] A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (*Hernandez v. New York* (1991) 500 U.S. 352, 359-360 (plur. opn. of Kennedy, J.).)

At this step, the explanation need not be persuasive, or even plausible. (*Purkett v. Elem* (1995) 514 U.S. 765, 767-768.)

Here, the prosecutor stated race-neutral reasons with respect to each of the excused jurors: No. 1390718 (family member accused of molest); No. 1349172 (had a DUI and two nieces who were molested and the investigation was ongoing); and No. 1207916 (involved in a violent street fight).

At step three of the *Batson/Wheeler* analysis, the trial court must decide whether the opponent of the peremptory strike has proved purposeful racial discrimination by a preponderance of the evidence. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 767; *People v. Hutchins* (2007) 147 Cal.App.4th 992, 997-998.) At this point, the persuasiveness of the proffered justification becomes relevant (*Johnson*, *supra*, 545 U.S. at p. 171), as implausible or fantastic justification will often be found to be a pretext for purposeful discrimination. (*Purkett v. Elem*, *supra*, at p. 768.)

But a prosecutor is presumed to use his or her peremptory challenges in a constitutional manner (*People v. Alvarez* (1996) 14 Cal.4th 155, 193; *Wheeler*, *supra*, 22 Cal.3d at p. 278), and the justification proffered for the particular excusal "need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 136.) "What is required are

reasonably specific and neutral explanations that are related to the particular case being tried." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1218.)

> "All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. '[A] "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]' [Citation.]" (*People v. Reynoso* (2003) 31 Cal.4th 903, 924, quoting *Purkett v. Elem*, *supra*, 514 U.S. at p. 769.)

Once the prosecutor "come[s] forward with an explanation that demonstrates a neutral explanation related to the particular case to be tried" (*People v. Johnson*, *supra,* 47 Cal.3d at p. 1216), the trial court must then satisfy itself that the explanation is genuine. (*People v. Hall* (1983) 35 Cal.3d 161, 168.) "In [this] process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.)

> "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, for 'we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' [Citation.]" (*People v. Hall*, *supra*, 35 Cal.3d at pp. 167-168.)

"When a trial court has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror, we accord great deference to its ruling, reviewing it under the substantial evidence standard. [Citations.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 104-105.) Deference does not, of course, "imply abandonment or abdication of judicial review." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 340.)

We find that substantial evidence supports the trial court's ruling with respect to juror No. 1390718. When questioned, she stated that she had two nieces who were the victims of molestation by her brother. The situation occurred six or seven years earlier, but had not gone to trial until three years ago. Her brother was currently in prison. This

alone could serve as a valid race-neutral reason to excuse her. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1282 [prospective juror's relative's conviction of a crime was a proper consideration justifying peremptory challenge]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1049 [prosecution properly challenged juror whose uncle had been convicted of murder].) In addition, juror No. 1390718 expressed some animosity toward her brother's counsel for what she perceived as not defending him properly, as he took a plea. A peremptory challenge based on a negative experience with law enforcement is a proper race-neutral reason. (*People v. Turner* (1994) 8 Cal.4th 137, 171, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

Appellant contends that the prosecutor's reasons were suspect because juror No. 1390718 appeared to be favorable to the prosecution. The juror described herself as an elementary school administrator who frequently investigates possible cases of physical or sexual abuse involving children and reports them to child protective services. She admitted that she was a "child advocate," biased in favor of the prosecution if the case involved a child, and she did not believe a victim's personality played a role in his or her victimization. She also expressed positive experiences with law enforcement officers, as they regularly visited the school as part of the DARE (Drug Abuse Resistance Education) program and anti-gang events. While juror No. 1390718 did express these sentiments, the prosecution may have felt they did not outweigh her opinions concerning her brother and the reasons for his conviction and incarceration.

Appellant also argues that the prosecutor's reasons were suspect because juror No. 1390718 had circumstances similar to those of juror No. 1189714, who was seated after the *Batson/Wheeler* motion was denied. Juror No. 1189714 stated he was "not sure the exact facts," but he had an uncle who was "apparently … arrested for having a relationship with—it turned out to be a minor." The uncle "served some time," then lost his residence, and was subsequently deported. We see a distinction between the two jurors. Juror No. 1189714 stated that "somebody" in the juror's family was of the opinion that the uncle had not received "very good representation in the legal process"

but he himself had not formed any opinion about how the case was handled. The juror stated that he would not have any difficulties being fair to both sides in the current case, and his only bias would be that, growing up, his father "was big on never lay a hand on a woman …. And on the case here, at least we know that much about it."

While juror No. 1390718 expressed some concern with the judicial process, juror No. 1189714 did not.

In addition,

> "[i]t is also common knowledge among trial lawyers that the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side. Near the end of the voir dire process a lawyer will naturally be more cautious about 'spending' his increasingly precious peremptory challenges. Thus at the beginning of voir dire the lawyer may exercise his challenges freely against a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias." (*People v. Johnson*, *supra*, 47 Cal.3d at pp. 1220-1221.)

Juror No. 1390718 was questioned and excused on the first day of voir dire; juror No. 1189714 was questioned on the second day, near the end of jury selection.

Finally, appellant's claim is undercut by the fact that the prosecutor also excused other non-Hispanic jurors who had similar circumstances to those of juror No. 1390718. The prosecutor excused juror No. 1168458, whose brother was accused of domestic violence, and she did not think he had been treated fairly by the police. And the prosecutor excused juror No. 1455062, who had a close family friend convicted of having sex with a minor, and who expressed some concern that the situation was "not handled as well as it could have been," although she thought she could be fair in considering the charges against appellant.

In addition to juror No. 1390718, the other two prospective Hispanic jurors were excused for race-neutral reasons supported by the record, justifying the peremptory challenges. Juror No. 1349172 explained that he was convicted of a crime, as he had

received a DUI in 2005. He also had a relative who was involved in a criminal investigation, as his mother's uncle was being investigated for molesting a niece. And juror No. 1207916, when asked if he had been the victim of any kind of violence, stated that he was in a street fight two years earlier and was jumped and stabbed. Although the case was reported to the police, no one was ever prosecuted.

Each of these reasons, individually or in the aggregate, suggests legitimate, race-neutral grounds upon which the prosecutor might have challenged the prospective jurors. We must give "great deference to the trial court in distinguishing bona fide reasons from sham excuses. [Citations.]" (*People v. Turner, supra*, 8 Cal.4th at p. 165.) The *Wheeler* court recognized that appellate courts can "rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*Wheeler, supra*, 22 Cal.3d at p. 282; see also *People v. Johnson*, *supra*, 47 Cal.3d at p. 1216.)

Given the substantial evidence standard of review, the burden on the opponent of the challenge, and the appropriate deference we must extend to the trial court, we conclude the peremptory challenges were proper and there is no *Batson/Wheeler* error.

2. Sufficiency of the Evidence

Appellant contends the evidence is insufficient to support his torture conviction. Conceding that his argument is not supported by existing law, he asks that we rely on dissenting opinions in *People v. Jung* (1999) 71 Cal.App.4th 1036, 1043-1049 (dis. opn. of Armstrong, J.) and *People v. Pre* (2004) 117 Cal.App.4th 413, 425-426 (conc. & dis. opn. of McIntyre, J.). We conclude that, under the standards for establishing torture as set forth by California Supreme Court precedent, his argument is not well taken.

In reviewing the sufficiency of the evidence to support a conviction, we determine "'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.'" (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13, quoting *People v. Ainsworth* (1988) 45 Cal.3d 984, 1022.) Under such standard, we review the facts

adduced at trial in the light most favorable to the judgment, drawing all inferences in support of the judgment to determine whether there is substantial direct or circumstantial evidence the defendant committed the charged crime. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusions. (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

In considering the sufficiency of the evidence, we cannot reweigh the evidence, as the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. (Evid. Code, § 312.) Rather, we simply consider whether any rational trier of fact could have found the essential elements of the charged offenses beyond a reasonable doubt. (*People v. Rich* (1988) 45 Cal.3d 1036, 1081.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict," the conviction will not be reversed. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

Section 206 provides that "[e]very person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury … upon the person of another, is guilty of torture." The intent necessary for torture, that is, to cause cruel or extreme pain, does not require that the defendant acted with premeditation or deliberation or had the intent to inflict prolonged pain. (*People v. Hale* (1999) 75 Cal.App.4th 94, 107.) Direct evidence of specific intent is rarely available, although the circumstances surrounding the offense or other circumstantial evidence may permit an inference that one acted with the intent to inflict cruel or extreme pain. (*People v. Mincey, supra*, 2 Cal.4th at p. 433; *People v. Jung, supra,* 71 Cal.App.4th at p. 1043.)

"[S]everity of a victim's wounds is not necessarily determinative of intent to torture" since "[s]evere wounds may be inflicted as a result of an explosion of violence [citation] or an 'act of animal fury'" rather than an intent to inflict pain for revenge,

extortion, persuasion, or other sadistic purpose. (*People v. Mincey*, *supra*, 2 Cal.4th at p. 432.)

> "It does not follow, however, that because the severity of the victim's wounds is not necessarily determinative of the defendant's intent to torture, the nature of the victim's wounds cannot as a matter of law be probative of intent. Intent is a state of mind. A defendant's state of mind must, in the absence of the defendant's own statements, be established by the circumstances surrounding the commission of the offense. [Citation.] The condition of the victim's body may establish circumstantial evidence of the requisite intent." (*Id.* at p. 433.)

In this case, K.I. went to bed around 9:30 p.m. She awoke to find appellant naked and in her bed. K.I. asked him to leave, and as he started to get dressed, he asked her, "[W]ho's this Eddie?" K.I. explained that Eddie was a friend. In response, appellant, "in one motion," grabbed her arm, pulled her close to him and punched her. The punch "shattered" the left side of her face and drove part of the orbital bone back into her skull. Blood came "pouring" from her face. Appellant then pushed her onto the end of the bed, straddled her body and punched her head from side to side. Appellant called her a "fucking bitch," "fucking whore" and told her "tonight you die. Tonight's the last night you'll ever see your babies again. Tonight you'll die." Appellant continued to punch K.I., "dozens of times," and then started to choke and strangle her. She lost sensation in her arms. She was afraid she was going to die, and she then lost consciousness.

When she came to, appellant was on the bed "crouched … on his haunches." Appellant asked if she was going to attend a concert with him. She said no. By now her eyes were swollen shut. Appellant punched her in her sides and ribs and again called her names. K.I. was eventually able to use her feet and push him off of her. She got off the bed and tried to run for the door, but appellant grabbed her by the hair and told her to "find your gun." Although K.I. no longer had a gun, she told appellant it was in the closet. Appellant pulled everything from the closet and became "more angry" when he could not find it.

Appellant began hitting K.I. again. While all of this was happening, K.I. was bleeding. She attempted to leave a "blood trail" because appellant told her this would be "the last night I would live, and I was just trying to leave a story for somebody so they knew every room I was in and they would have a story to follow, because I knew that night I was going to die."

Appellant hit and punched K.I. and pushed her into the closet. He then stomped and kicked her back, neck, and ribs. She tried to roll to protect her ribs, but appellant grabbed her hair, stood her up, cussed at her, and demanded that she find the gun. K.I. bartered with appellant and told him that, if he left, she would say that two Black men came into her house and robbed and beat her. But appellant told K.I. she was lying and he knew she would call the police.

K.I.'s voice was hoarse and her throat swollen from being choked. Her eyes were swollen shut. Appellant continued to call her a whore and a bitch and tell her she was going to die. He insisted that she find the gun and wanted her to go into her daughter's room. She could not walk and fell. Appellant continued to hold her by the hair, kicked her, and dragged her out of the bedroom. Appellant dragged her into both her daughter's and son's rooms, looking for the gun.

While in K.I.'s daughter's room, appellant told K.I. she was lying and "fucking with" him. He threw her on the bed and said "tonight is the night you are going to know what it's like to be raped and violated." He then punched her, inserted two fingers into her vagina, and raped her. K.I. screamed, and appellant laughed. He repeated what he had said earlier, "tonight is the night you'll know what it's like to be raped and violated." K.I. described the pain as "searing and burning." Appellant choked her again, and she soon passed out.

K.I. came to and appellant hit her with his fists. He also bit her left nipple. Appellant again demanded the gun. K.I. asked that he call for an ambulance because she thought she was going to die. He then pulled her by her hair onto the floor, dragged her out into the hall, and threw her onto her bed. He became violent and angry, and again

punched and choked her. K.I. scratched appellant's face and chest, hoping to get some of his skin under her fingernails "for the police," although her hands were going numb. She then blacked out.

When K.I. came to, appellant was still looking for the gun. She tried to run out of the room, but appellant grabbed her by the hair, pushed her to the floor, and again told her she was going to die. He choked her for the fourth time. She tried to push him off of her, but he grabbed her by the hair. He told her to "tell my son that at my funeral that I loved him and I was a good father to him."

K.I. fell asleep. When she finally opened her eyes, she heard someone in the kitchen or living room. She rolled off of the bed, held her eyes open with her hands, and made it out the back door. She climbed a fence into her neighbors' yard, went into their house and asked them to call an ambulance. It was after 1:00 a.m. when she entered the neighbors' house.

Police who responded to the scene described K.I. as having a bruised forehead, bruised and swollen eyes, blood dripping from the corner of her eyes, swollen lips, and dried blood around her nose and inside her mouth. She had bruising and swelling on her neck, jaw, shoulders, chest, back and calf, and abrasions on her inner thighs. She had difficulty breathing. K.I.'s house was in disarray, and there was a large amount of blood in the bedroom.

As a result of the assault, K.I. suffered a collapsed lung, cephalohematoma, which is bruising and swelling in the head, concussion syndrome, a fracture of the face, bilateral subjunctival hematoma, which is bruising of the whites of her eyes, and multiple abrasions and contusions. Since the assault, appellant has had multiple eye surgeries, receives nerve blocks for pain, and suffers from headaches.

In *People v. Pre*, *supra*, 117 Cal.App.4th 413, the defendant made a similar argument to that here—that his torture conviction was not supported by the evidence. (*Id.* at p. 419.) In *Pre*, the defendant forced his way into the victim's apartment. The defendant and victim struggled until she fell to the floor. The defendant then choked the

victim and dragged her to an area in the apartment where she could not be seen through a window. He choked her until she lost consciousness. When she came to, he was biting her ear. He then choked her until she passed out again. When she regained consciousness, the defendant was gone. The victim suffered a fractured cheek, bite marks on her hand, an injury to her right temple and to an internal organ, and a fracture to a finger, which was later amputated. The injury to her ear required over 100 stitches. She had bruises on her breasts and back, and appeared to have another bite mark on her back. (*Id.* at pp. 417-418.)

The court in *Pre* disagreed with the defendant and reasoned:

> "While various intents could be ascribed to [the defendant's] initial entry and attack, once he had subdued [the victim] by choking her into unconsciousness, a reasonable jury could have concluded that his subsequent use of force against [the victim] was not pursuant to a need to subdue [the victim] as part of a belief in the need for self-defense or pursuant to a robbery. A reasonable jury could have concluded [the defendant] had neither intent; if [the defendant's] intent was self-defense or robbery, while [the victim] was unconscious he would have taken her purse and left or bound her while he ransacked the apartment. [The defendant] did neither. Instead, while [the victim] was unconscious, he changed his position, cradled her head and shoulders in his lap, and proceeded to bite her ear. He did not merely nibble her ear, a sensitive body part, but bit it so severely that he nearly bit through her ear.… This was bizarre conduct, not necessitated by any attempt to rob her or belief in self-defense. A reasonable inference is that [the defendant] bit her ear pursuant to an intent to inflict extreme pain on his victim for his own sadistic pleasure. [¶] Moreover, once [the victim] gained consciousness, [the defendant] choked her again until she passed out. Further [the victim] suffered other injuries that she did not describe as occurring during the initial struggle, including what appears to be a bite mark on her back. A reasonable jury could have concluded these injuries were inflicted when [the victim] was unconscious, that is, during a period when [the defendant] could have left the apartment if his intent had only been to take her purse or to defend himself against her attack and that these injuries were inflicted for the purpose of inflicting severe pain for revenge or [the defendant's] sadistic pleasure." (*People v. Pre*, *supra*, 117 Cal.App.4th at p. 422.)

Here, as in *Pre*, the totality of the circumstances—including the level of violence, the nature of K.I.'s injuries, the manner and the length of time in which appellant

inflicted them, the constant threats after questioning K.I.'s relationship with Eddie, and the callous indifference in the face of K.I.'s need for medical intervention—support the inference of an intent to cause severe pain for revenge or appellant's sadistic pleasure. The evidence was abundantly sufficient to support appellant's conviction of torture.

DISPOSITION

The judgment is affirmed.

_____
DAWSON, J.

WE CONCUR:

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LEVY, Acting P.J.

_____
KANE, J.